FILE COPY

NOV 13 1936

CHARLES ELMORE CROPLEY
CLERK

No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA, APPELLANT

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES, CURTISS-WRIGHT EXPORT CORPORATION AND CURTISS AEROPLANE & MOTOR COMPANY, INC.

INDEX

	PAGE
Statement	1
Summary of Argument	3
Argument:	
I. Upon this appeal the court may consider any point making against the validity of the Joint Resolution	5
II. The Joint Resolution was invalid because it was not to go into operation until after an optional proclamation which the President might never make	16
III. The Resolution is invalid because its duration if ever it went into operation, was left likewise to the uncontrolled discretion of the President	26
IV. The Power to Prescribe Limitations and Exceptions Invalidates the Resolution	27
V. The Prohibition of the Sale of Arms and Munitions Never Went Into Effect Because the President Failed to Comply With the Conditions Prescribed by the Joint Resolution	28
VI. The Joint Resolution is not presently valid, or alive for the purpose of sustaining prosecution for offenses heretofore committed thereunder	31

CITATIONS

Cases:

Aurora, The, 7 Cranch. 382	22
Butte Consolidated Mining Co. v. *Montana Ore Purchasing Co.*, 24 Mont. 125	34
City of St. Louis v. *Kellman*, 235 Mo. 687	34
Federal Radio Commission v. *Nelson Bros. Co.*, 289 U. S. 266	21
Field v. *Clark*, 143 U. S. 649	21, 23, 26
Hampton & Co. v. *United States*, 276 U. S. 392	21
Hertz v. *Woodman*, 218 U. S. 205	36

	Page
Irresistible, The, 7 Wheat. 551	36
Jessee v. *De Shong* (Texas), 105 S. W. 1011	34
Knoxville v. *Knoxville Water Co.*, 212 U. S. 1	21
Langnes v. *Green*, 282 U. S. 531	10
Langworth v. *Kadel*, 141 Kansas 256	22
Louisville & Nashville R. R. Co. v. *Garrett*, 231 U. S. 298	21
Mahler v. *Eby*, 264 U. S. 32	28, 30, 31
Moore v. *United States*, 85 Fed. 465	35
Mutual Film Corp. v. *Ohio Industrial Commission*, 236 U. S. 230	16–21
New York Central Securities Co. v. *United States*, 287 U. S. 12	21
Oakland Paving Co. v. *Hilton*, 69 Cal. 479	34
Pacific States Box & Basket Co. v. *White*, 296 U. S. 176	21
Panama Refining Co. v. *Ryan*, 293 U. S. 388	17, 19, 31
Philadelphia & Trenton Car Co. v. *Stimpson*, 14 Peters 448	28
Reagan v. *Farmers' Loan and Trust Co.*, 154 U. S. 362	21
Schechter Corp. v. *United States*, 295 U. S. 538	17, 19
Schooner Rachel, 6 Cranch. 329	33
Talbott v. *United States*, 208 Fed. 144, certiorari denied, 232 U. S. 722	22
Union Bridge Co. v. *United States*, 204 U. S. 364	21
United States v. *American Railway Express Co.*, 265 U. S. 425	9
United States v. *Biggs*, 211 U. S. 507	7
United States v. *Bitty*, 208 U. S. 393	6
United States v. *Chambers*, 291 U. S. 217	33
United States v. *Chavez*, 228 U. S. 525	15, 22
United States v. *Chicago, St. Paul M. & O. R. R. Co.*, 151 Fed. 84	35
United States v. *Hastings*, 296 U. S. 188	10
United States v. *Keitel*, 211 U. S. 370	7, 8
United States v. *Kissel*, 218 U. S. 606	7
United States v. *Lucas*, 6 Fed. (2d) 327	22
United States v. *Mesa*, 228 U. S. 533	15, 22
United States v. *Mescall*, 215 U. S. 26	16
United States v. *Nixon*, 235 U. S. 231	11
United States v. *Shreveport Grain Co.*, 287 U. S. 77	12

PAGE

United States v. *Tynen*, 11 Wall. 88 34

Wichita Railroad & Light Co. v. *Public Utilities Commission*, 260 U. S. 48 28

Yeaton v. *United States*, 5 Cranch. 281 32

tatutes:

Act of February 25, 1871, Chap. 71 (16 Stat. 432) 35

Tariff Act of October 1, 1890, c. 1244 (26 Stat. 567) 23, 24

Quarantine Act of 1905 (33 Stat. 164) 11

Pure Food & Drug Act of June 30, 1906 (34 Stat. 768) c. 3915 13

Criminal Appeals Act of March 2, 1907 (34 Stat. 1246) c. 2564 ..... 1, 6, 7, 8, 9, 10, 11, 12, 15

Joint Resolution of March 14, 1912 (37 Stat. 630) 22, 23

Act of March 4, 1913, c. 145 (37 Stat. 823, 831) 11

Joint Resolution of January 31, 1922 (42 Stat. 361) 20, 22

Joint Resolution of May 28, 1934 (48 Stat. 811) 2, 3, 5, 16, 17, 20, 26, 27, 29, 30, 31, 32, 33, 36

Revised Statutes, Sec. 13 ..... 5, 33, 34, 35, 37

Revised Statutes, Sec. 2347-2350 (Coal Land Act) 14, 15

Revised Statutes, Sec. 5440, Crim. Code 37 ..... 2, 14

Joint Resolution of August 31, 1935, c. 837 Stat., 74th Congress, First Session 1935 20

roclamations:

May 28, 1934, 48 Stat. 1744-45 ..... 2, 18, 19, 29

November 14, 1935, No. 2147 ..... 2, 32

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 98

THE UNITED STATES OF AMERICA, APPELLANT

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES, CURTISS-WRIGHT EXPORT CORPORATION AND CURTISS AEROPLANE & MOTOR COMPANY, INC.

STATEMENT

Appealing (under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, Government's Brief, p. 31), the Government asks review of a judgment of the District Court, for the Southern District of New York, rendered on April 20, 1936, sustaining demurrers of various defendants to, and dismissing the first count of, a two-count indictment, filed on January 27, 1936. The District Court filed an opinion in support of such judgment on March 25, 1936 (R. 11), and a supplemental opinion on April 6, 1936 (R. 23). These opinions are reported in 14 F. Supp. 230.

The first count only is before this Court. It charges criminal conspiracy (under Section 37 of the Criminal Code), to sell machine guns to Bolivia, in violation of Section 1 of a Joint Resolution of Congress, approved May 28, 1934 (c. 365, 48 Stat. 811, Government's Brief, pp. 2-3), and of the provisions of a Presidential Proclamation thereunder, made on the same day (48 Stat. 1744-1745, Government's Brief, pp. 27-29).

The time of the alleged conspiracy was laid as between May 29, 1934 ~~to~~ and some unknown date later than September 28, 1934. (R. 3).

On November 14, 1935, by a second Proclamation (No. 2147, Government's Brief, pp. 29-31), the President declared:

> "I have found that the prohibition * * * will no longer be necessary as a contribution to the reestablishment of peace" etc.,

and he revoked that prohibition from and after November 29, adding this proviso: *

> "That this action shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the aforesaid Proclamation * * * of May 28, 1934, or the Joint Resolution * * * approved * * * on the same date; and that the said Proclamation and Joint Resolution shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The objections urged under the demurrers (Opinion, R. pp. 13, 14, 18) may be stated thus:

---

* It closely follows the wording of §13, R. S.

1. The provision of the Joint Resolution, attempting to empower the President to determine whether the prohibition of the sale of arms in the United States to the warring countries may contribute to the reestablishment of peace, was an unlawful delegation of legislative power.

2. The Joint Resolution never went into operation because the President's Proclamation did not contain all the findings prescribed by the Joint Resolution.

3. The count shows on its face that the President could not have consulted other governments as contemplated by the Resolution.

4. The second Proclamation of November 14, 1935, operated to extinguish the alleged liability.

The demurrers were sustained upon the first ground only.

SUMMARY OF ARGUMENT

I.

Under the Criminal Appeals Act, this Court may consider upon this appeal any point making against the validity of the Joint Resolution. The Government's contention that this Court's review is confined solely to the specific point upon which the district Court based its decision that the Joint Resolution was invalid, finds no support in the Act or in the decisions of this Court; and, if accepted, would defeat the purpose of the Act, which is to secure from this Court instruction for the district courts as to the validity and meaning of the particular statute upon which the indictment is based.

II.

The Joint Resolution is invalid because its going into operation depended upon the President's making an optional proclamation, which the President might never make. The Resolution imposed on the President no duty to make a proclamation but left his discretion in this regard unfettered. The authority here conferred to make or to refuse to make a law is essentially a legislative function which may not be delegated or surrendered by the Congress.

III.

By the same principle, the Joint Resolution is invalid for the further reason that its duration, if ever it went into operation, was likewise left to the uncontrolled discretion of the President. The President was left free to bring the law to an end whenever he wanted to. But the making an end of a law is as much a legislative act as is making the law in the first instance.

IV.

Again, the power granted to the President to prescribe limitations and exceptions to the prohibition likewise invalidates the Joint Resolution. This power is similarly a legislative power, and the Joint Resolution has entirely failed to set any bounds or guides for the President's exercise thereof.

V.

The sale of arms never became unlawful because the President failed to comply with the conditions prescribed by the

Joint Resolution. The President's proclamation does not declare that he had secured the co-operation of *any* American Republic, as required by the Joint Resolution. Even if the language of the proclamation could be construed to amount to a general statement to the effect that the conditions had been complied with, this would not suffice. In exercising a delegated power the President is required to state affirmatively his compliance with the terms governing the use of that power and indicate the details of his compliance.

VI.

The Joint Resolution is not presently valid or alive for the purpose of sustaining prosecution for offenses heretofore committed thereunder. The Joint Resolution expired and became inoperative with the issuance of the revoking proclamation on November 14, 1935, and no further proceedings can be had to enforce it, unless competent authority has kept the Joint Resolution alive for that purpose. The provision of the revoking proclamation was not such competent authority; and Section 13, R. S. does not apply because (*a*) the Joint Resolution was not *repealed;* and (*b*) it is not a *particular* provision of law for the purpose of continuing a *temporary* measure.

ARGUMENT

I

UPON THIS APPEAL, THIS COURT MAY CONSIDER ANY POINT MAKING AGAINST THE VALIDITY OF THE JOINT RESOLUTION.

Because the District Court based its decision of invalidity upon *one only* of three grounds urged upon it (R. 22), the Government here argues that the Criminal Appeals Act

(Chap. 2564, 34 Stat. 1246, as amended—copied in its brief, p. 31), does not permit consideration on this appeal of any ground of invalidity other than the single one upon which the Court below sustained the demurrers (Government's Brief, p. 21).

As in this brief we purpose to urge and argue that the Joint Resolution of May 28, 1934, was manifestly invalid on other grounds, we desire in the outset to convince this Court of our right so to do.

In answer to the Government's narrow reading of the Appeals Act, we say:

(1) Such a reading is erroneous.

(2) This Court has furnished precedents for a broader reading, and

(3) The narrow reading has no support of authority.

The Government's Narrow Reading Is Erroneous:

The Act, so far as here pertinent, permits an appeal by the Government from a decision or judgment of the District Court in a criminal case, sustaining a demurrer to any indictment, or any part thereof

> "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

In its Statement of Jurisdiction the Government correctly stated that the judgment sustaining respondents' demurrers as to the first count of he indictment, *was based upon the invalidity of the Joint Resolution upon which the indictment was founded.*

In *United States* v. *Bitty,* 208 U. S. 398, 400, speaking generally, this Court said:

"Hence, that there might be no unnecessary delay in the administration of the criminal law and *that the courts of original jurisdiction may be instructed as to the validity* and meaning of the particular statute sought to be enforced, the above Act of 1907 was passed." *

In *United States* v. *Biggs*, 211 U. S. 507, this Court said (p. 522):

"* * *The power given is consistent with the purpose for which it was conferred; that is, to have determined, in a case within the statute, the question whether or not the Government is entitled to further prosecute the case.* * *"

In *United States* v. *Keitel*, 211 U. S. 370, the Court said (p. 398):

"* * the purpose of the statute" (Criminal Appeals Act) "was to give the United States the right to seek a review of decisions of the lower court concerning the *subjects embraced within the clauses of the statute*, and not to open here the whole case."

The "subjects" thus referred to are those specified by the Criminal Appeals Act, namely the validity or construction of the statute on which the indictment was founded. That this is so is made plain by this Court in *United States* v. *Kissel*, 218 U. S. 606, cited also by the Government (its brief p. 22). In following the *Keitel* case this Court declared (p. 606):

"That this court is confined to a consideration of the *grounds of decision mentioned in the statute*, when an

* Unless otherwise stated, all italics are ours.

indictment is quashed was decided in *United States* v. *Keitel*, 211 U. S. 370, 399."

The Act nowhere provides, nor has this Court ever held that it must confine its consideration to the *specific point* upon which the District Court based its judgment of invalidity, or disregard other points fatal to validity.

We submit that the objects thus sought may not be fully attained, unless, on a single appeal, this Court may hear and determine any and every question going to the validity of the statute held invalid by the District Court. It cannot be achieved by considering one objection of several urged below on one appeal, and other objections in further stages of the cause, should the case be remanded. Instructions as to validity should not be given piecemeal or little by little.

The inadequacy of such a narrow reading can best be appreciated by considering its consequences.

In the first place, in any case where, as here, three objections to validity were urged upon the Court below, that Court, (under the Government's reading of the Appeals Act), could control the extent of review in this Court. For, by basing its decision solely on *one* of the three grounds, and either disregarding the other two, or holding them to be insufficient, the District Court could narrow the inquiry on appeal to the particular one so selected by it.

In such event, if this Court felt that particular ground was not well taken, it would be obliged to remand for further proceedings, even though it felt certain that one or both of the other objections were fatal to the validity of the statute.

When the case again reached the lower court, the other objections could be renewed. Possibly the reasoning in

briefs filed here, might persuade the lower court that its original view of one or the other of the objections was erroneous. Or it might come to that view upon a reargument before it, in which event it would sustain the demurrers upon one of the other grounds, and the Government would again appeal, and even on the second appeal, one only of the other objections would be up for review in this Court. This would be so, although all three of the objections to validity had always inhered in the situation.

Or, upon remand, after plea, and preparation for trial, the case might go to trial and verdict. If the verdict were against the defendants, they could appeal to the proper appellate court; with the certainty that, if either of their original additional objections was well founded, the prosecution must ultimately fail.

Any one of those three original objections, going to the invalidity of the indictment, if sustained below, would have warranted an appeal in the first instance. Or if the District Court had based its decision on all three, all three could be considered here on the single appeal. We think the Government itself would concede this much. It cannot be that the view of the District Court as to any one of the three objections should operate (on an appeal under the Act) to exclude consideration, by this Court either of it or of any other objection, aimed at the invalidity of the statute.

Within the field in which appeals are allowed under the Criminal Appeals Act, judgments properly appealed from are subject to the rules governing review on appeals in general. There is nothing in the language of the Act that operates to exempt such appeals from those rules. The general rule has been stated by this Court in *United States v. American Railway Express Company*, 265 U. S. 425, 435, as follows:

> *"But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree, any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked, or ignored by it."*

In *Langnes* v. *Green*, 282 U. S. 531, this Court in applying this rule, said (p. 538):

> "Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. *His right to do so is beyond successful challenge,* quite apart from the fact that this is a proceeding in admiralty, and is here from an intermediate appellate court."

We are not urging that, to defeat this appeal, we may advance every contention that might defeat the indictment. The *Hastings* case, 296 U. S. 188, rightly declared that where the court below has rested its decision not solely upon the invalidity or construction of the statute, but has also sustained the demurrer or granted the motion to quash the indictment upon wholly independent grounds of insufficiency, an appeal, otherwise permissible, must be dismissed, because, whatever the views of this Court on the questions reviewable, the judgment below would have to be sustained on the ground not here reviewable.

E converso, if the questions to be urged are those, and those only, that would be the subject of review under the Act had the Court below based its decision thereon, the right to consider and determine them is not lost merely because the lower Court disregarded or refused to uphold them. Only

by allowing ~~true~~ due consideration of all thereof upon a single appeal may the full purpose of the Appeals Act be accomplished, and the validity of the statute involved be fully determined, once and for all.

This Court Itself Has Given a Broader Meaning to the Criminal Appeals Act.

On appeals under the Act, this Court has often refused to consider questions not involving the validity or construction of the statute under which the prosecution was had. But we have not found a case in which it refused to consider a question affecting the validity of such a statute, merely because that question was not the precise ground upon which the Court below rested its decision. On the contrary, we have found several cases in which this Court has considered such other questions.

In *United States* v. *Nixon,* 235 U. S. 231, this Court reversed a memorandum decision (apparently not reported) of the District Court for the Western District of Missouri, sustaining a demurrer to an indictment as not charging any offense for which the defendants (receivers of a railroad) could be held. The charge was that the receivers had unlawfully transported cattle without compliance with the rules established by the Secretary of Agriculture. The lower court treated the indictment as founded on the Quarantine Act of 1905 (33 Stat. 164), and correctly held that such act did not apply to receivers.

This Court reversed on the ground that the Act of March 4, 1913, (c. 145, 37 Stat. 823, 831), had extended the 1905 Act so as to make it applicable to receivers. The existence of such 1913 Act had not even been brought to the attention of the lower court. The Court indicated the contention before it as follows:

"And it is contended that, inasmuch as the Criminal Appeals Act only authorized a review of a decision in so far as it was 'based upon the * * * construction of the statute upon which the indictment was founded' * * * the correct ruling that receivers are not within the Act of 1905, ought not to be reversed because it now appears that they were within the terms of the Act of 1913, which was not brought to the attention of the District Judge, and was not therefore construed by him in fact."

Of that contention this Court said (pp. 235, 236):

"within the meaning of the Criminal Appeals Act * * * the statute on which, as matter of law an indictment is founded, may be misconstrued not only by misinterpreting its language, but by overlooking its existence and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms.

* * *

In rendering that decision he made a ruling of the very kind which the United States was entitled to have reviewed under the provisions of the Criminal Appeals Act (34 Stat. 1246). If that were not so, the right of the government could in any case be defeated by entering a general order of dismissal, without referring to the statute which was involved or without giving the reasons on which the decision was based."

In *United States* v. *Shreveport Grain Co.*, 287 U. S. 77, this Court reversed a judgment of the District Court (46 Fed. (2d) 354), sustaining a demurrer grounded on the invalidity of the statute on which the indictment was based. In reaching its conclusion, this Court considered one con-

tention as to invalidity which, so far as the decision of the court below discloses, was not relied on by that court.

The indictment charged misbranding of certain sacks of corn bran (in violation of the Pure Food and Drugs Act of June 30, 1906), as containing "100 lbs. net", whereas in truth each contained a lesser quantity. Paragraph 3 of Section 8 of that Act provided that an article should be deemed misbranded if it was in package form, and the quantity of the contents was not marked on the package, with the following proviso:

> "Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages, shall be established by rules and regulations made in accordance with the provisions of section three of this Act."

In sustaining the demurrer the lower court held that the above proviso made it necessary to read Section 8 as prohibiting only *unreasonable* variations in weight, and that the test thereby indicated was so indefinite that it failed to fix any ascertainable standard of guilt, or afford a valid definition of crime, and that the statute was therefore unconstitutional under the Sixth Amendment. This question involved a construction of the Pure Food and Drugs Act.

In reversing, this Court considered not only the ground so relied on by the lower court, but also considered and held without merit a further contention (urged in, but not relied upon or even considered, by the court below), that the Act underlying the indictment, contravened the provisions of the constitution with respect to the separation of the governmental powers, in that it involved an unconstitutional *delegation* of power. This further contention also involved a construction of the Pure Food and Drugs Act, and so was within the field of review under the Criminal Appeals Act.

In the *Keitel* case (211 U. S. 370), this Court reversed an order of the District Court (157 Fed. 396) quashing a first count, sustained an order quashing the second count, and remanded the case for further proceedings. In reaching its conclusion as to the first count, this Court considered at least one ground of contention as to invalidity which, in so far as the decision of the court below discloses, was neither relied on nor considered by that court.

The offense charged in the first count was conspiracy (under §5440 R. S., §37 Criminal Code) to violate the Coal Land Act—§2347 to §2350 R. S.—by entering, through their agents, additional coal lands, after each defendant had already acquired the maximum quantity that any one person was permitted to acquire.

In quashing this count, the lower court held that to constitute a conspiracy under §37 Criminal Code, the fraud charged must be either one to accomplish a criminal or unlawful purpose, or one to accomplish a lawful purpose by criminal or unlawful means; that, if the charge was merely constructive or equitable fraud, there could not be a criminal conspiracy; and that, as the acts charged against defendants did not amount to that common law fraud, and were not denounced as criminal nor prohibited by the Coal Land Act, it followed that the first count did not state an offense. Those questions involved the construction of the Coal Land Act.

In reversing, this Court considered not only the grounds so relied on by the lower court, but also a further contention urged by respondents as requiring an affirmance of the lower court's order quashing the first count. That other contention was that the rules and regulations of the G. L. O. recognized the right of one person to so enter land for another. This contention was held (by this Court) not borne out by

the rules and regulations themselves. It, too, involved construction of the Coal Land Act, but had not been considered by, or even suggested in, the lower court.

The Government in its brief seems to have taken inconsistent positions as to the scope of the review. First, on page 21, it argues that this Court may not consider any other question than the *precise one* relied on by the Court below. It would necessarily follow, if that reasoning were correct, that the decision of this Court could not be an adjudication upon any other than the precise question so relied on below. But, on page 15 of its brief, when arguing for the validity of the delegated powers, it insists that the validity of the Joint Resolution of March 14, 1912, was *conclusively determined* in the cases of *United States* v. *Chavez*, 228 U. S. 525 and *United States* v. *Mesa*, 228 U. S. 533.

Both these cases came to this Court by appeal under the Criminal Appeals Act. The Court below had considered only the meaning of the word "export" in that Resolution, i. e., whether an exporting, within the meaning of the word as used in the Resolution, had been sufficiently alleged in the indictment. So that, in line with the Government's contention on pages 20, 21 and 22 of its brief, if that contention were well founded, no other question than the meaning of the word "export" could possibly have been considered or determined or adjudicated by this Court in those cases. It seems to us inconsistent to contend on the one hand for the narrow scope of the review, and on the other hand to insist that these cases conclusively determine any question arising on this appeal.

The Narrow Reading Has No Support of Authority.

Save the *Keitel* case, which we have already analyzed as really, in practice, supporting our position, not one of the

cases cited on page 21, of the Government's brief, deals with this question.

On page 22, the Government cites *United States* v. *Mescall*, 215 U. S. 26, 31. In that case, after quoting from the *Keitel* case, this Court said that its inquiry was "directed to the particular question decided by the Court below". The context makes it clear that the "question" there referred to, was the construction of the statute on which the indictment was founded.

Respondents do not ask this Court to extend its jurisdiction to any other than the question appealed from, i. e., the validity of the Resolution. They but ask that this broad question be reviewed in all its aspects, to see whether, under that Resolution, a valid judgment of conviction could ever be secured.

II.

THE JOINT RESOLUTION WAS INVALID BECAUSE IT WAS NOT TO GO INTO OPERATION UNTIL AFTER AN OPTIONAL PROCLAMATION, WHICH THE PRESIDENT MIGHT NEVER MAKE.

Making or refusing to make a law, is essentially a legislative function which may not be delegated or surrendered by the Congress.

Each of these delegated powers must be considered on its own merits. In *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 245, this Court said:

> "While administrative and legislative are quite distinct powers, the line which separates, exactly, their exercise, is not easy to define in words. It is best recognized in illustrations."

Without altering the language of the Joint Resolution, we

rearrange it to bring out more clearly its critical provisions, as follows:

> "That, *except under such limitations and exceptions as the President may prescribe* * * * it shall be unlawful * * * *until otherwise ordered by the President* or by Congress * * * to sell * * * in the United States * * * to those countries now engaged in armed conflict in the Chaco (Bolivia and Paraguay) * * * any arms or munitions of war * * * *if the President finds that the prohibition*" (thereof) "*may contribute to the re-establishment of peace* between those countries * * * *and if,* after consultation with the Governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, * * * he makes Proclamation to that effect."

For reasons presently to be stated, the situations dealt with in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Corp.* v. *United States,* 295 U. S. 538, aptly illustrate the unfettered discretion which this provision for a purely optional proclamation discloses.

One vice of this Resolution is that it undertook to give to the President an uncontrolled discretion to make or not to make the Proclamation.

Its language reads:

> "*If* the President finds * * * *and if* * * * he makes proclamation to that effect, it shall be unlawful to sell", etc.

The converse is that if he does not make such a proclamation, sales will be lawful. The sales are not prohibited merely upon his findings and consultations.

Although he may have found that the prohibition "may contribute to re-establish peace"; although he may have consulted with other American Republics and secured their cooperation; and although he may have consulted with other governments and secured their cooperation, these actions do not of themselves operate, under the provisions of the Resolution, to make the sales unlawful. They do not become unlawful until the President has chosen to proclaim the above happenings.

That proclamation is a final essential. But the President is under no obligation to proclaim anything. Whether he shall do so or not is purely optional. He may feel that he erred in his original approval of the Resolution, and this may move him not to make the proclamation. He may so decline for any other reason, or indeed, for no reason at all—and this, even though he may have found and done everything else that Congress deemed an essential prerequisite to putting the Resolution into effect. Thus, by merely refusing to take that last optional step, he may effectively prevent the contribution to peace that Congress considered desirable whenever such a situation should arise.

If such a provision for optional proclamation were permissible, under it the President could, in effect, reconsider his previous approval and convert it into a deferred veto—one that the Congress could never vote on or override, and one not provided for in the Constitution. This would be true also, had he vetoed the Resolution in the first instance, and had Congress at that time passed it over his veto. In such a case he might proceed to make the essential findings and consultations; but after doing all this, he might refuse to make the proclamation, with the result that the selling would remain lawful and unrestrained, and the Resolution inoperative.

If this may be done as to this particular Joint Resolution, it might be done as well with any other resolution or act of Congress. Thus, if the Congress were agreeable thereto, by the device of providing for some finding and a further provision that the Act should go into operation, only if and when the President proclaimed such finding, it could invest the President with a power far more effective than the constitutional veto. For, under such a power, by refusing to make any proclamation, he could prevent any such law from ever taking effect; and the only way the Congress could avoid that result would be by passing a new law, making a proclamation mandatory.

If the option to proclaim or not, i. e., to decide whether the law shall take effect or not, is not a surrender of the legislative power to make or not to make a law, it is hard to conceive what would amount to such a surrender in that regard.

If this Resolution had carried no provision for any finding whatever, but had merely declared in express words that, in his uncontrolled discretion, the President might proclaim when the Resolution should become effective, and that it should not go into operation until such proclamation, no one would argue that such a provision was not a surrender of the legislative will. Indeed, such a Resolution would present the same uncontrolled discretion that was condemned in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 430, and in *Schechter Corp.* v. *United States,* 295 U. S. 538, 539.

Equally is this the case where, as here, although there is a provision for a finding, there is no provision *requiring* the making of the proclamation thereof, without which the Resolution was not to go into effect. Here the going into operation was postponed until the proclamation should be made; and the proclamation, because optional in its character, need never be made.

In its brief (p. 16), the Government, when considering the first step, i. e. as to the right to delegate a power to make the finding as to prohibition of sale, quoted from the Panama case to distinguish it in that regard. But upon the contention now being argued with respect to the *optional* character of the proclamation, that very quotation turns against the Government and powerfully condemns the Resolution. We reproduce it as follows:

> "Congress has declared no policy, has established no standard, has laid down no rule. There is no *requirement,* no definition of circumstances and conditions, on which the transportation is to be allowed or prohibited."

So here there is no requirement for a proclamation and no definition of circumstances and conditions under which it *must* be made.

It is true that the optional provision here complained of is carried also in the general Joint Resolution of March 14, 1912, and in the amendatory resolution of January 31, 1922, as well as in Sections 4 and 5 of the Neutrality Resolutions of August, 1935—though Section 1 of the same resolutions furnishes an example of a *mandatory* provision. Many of the earlier resolutions carried an optional provision only, but of these earlier resolutions the present Chief Justice, speaking for the Court, in the Panama case (293 U. S. 388, 422), (as bearing on their force), referred to the lack of court decisions upon them, and thereof said:

> "These early acts were not the subject of judicial decision and, apart from that, they afford no adequate basis for a conclusion that the Congress assumed that it possessed an unqualified power of delegation. They were inspired by the vexations of American commerce through the hostile enterprises of the belligerent powers, they were directed to the effective execution of policies

repeatedly declared by the Congress, and they confided to the President, for the purposes and under the conditions stated, an authority which was cognate to the conduct by him of the foreign relations of the Government."

This lack of authoritative decision is noticeable upon an analysis of the cases cited in the Government's brief, to support its argument under Point I. Some of them, like *Hampton & Co.* v. *United States,* 276 U. S. 394; *Field* v. *Clark,* 143 U. S. 649, are under tariff acts. Others deal with powers confided to the Interstate Commerce Commission on rate regulations, etc. (*Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298; *Reagan* v. *Farmers' Loan and Trust Co.,* 154 U. S. 362; *New York Central Securities Co.* v. *United States,* 287 U. S. 12; see also *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1.) Still others have to do with control of the radio, film and similar industries. (*Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266; *Mutual Film Corp.* v. *Ohio Industrial Comm.* 236 U. S. 245; see also *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176.) One deals with the functions of the Secretary of War, confided to him under the constitutional power to control navigable waters. (*Union Bridge Co.* v. *United States,* 204 U. S. 364.)

But in all those cases the question arose under legislation *already in operation* and with respect to delegation of power over administrative details incident to its enforcement. No one of them involved a determination of the validity of a *condition,* upon the happening of which, a law *not yet in effect,* was or was not to be put into operation. The cases dealing with powers to be exercised in aid of the enforcement of acts of Congress *already in effect,* have no bearing upon the question before us.

Disregarding those cases, there remains of the cases cited by the Government but *The Aurora,* 7 Cranch. 382; *United States* v. *Chavez,* 228 U. S. 525; *United States* v. *Mesa,* 228 U. S. 533; *Talbott* v. *United States,* 208 Fed. 144; certiorari denied, 232 U. S. 722; and *United States* v. *Lucas,* 6 Fed. (2d) 327.

In the *Aurora* case, the revival of an expired non-intercourse act was by a subsequent Act conditioned to take effect upon the President's making a proclamation, which the later act required him to make upon the happening of a specified event. The event was the revocation or modification by France or Great Britain of their respective edicts harmful to American commerce. Such action, when taken, would be easily ascertainable. Of this feature the Supreme Court of Kansas, in *Langworth* v. *Kadel* (141 Kansas 256) said:

> "It was not a matter depending on a *contingency, the happening of which would be plainly discernible to any one,*—as the majority of the resident voters of a city or district, voting in favor of a project—but depended entirely upon the judgment of the governor, as to the necessity of a further extension", etc.

In the *Talbott* case, the Court of Appeals of the Fifth Circuit of the United States (in Texas), in upholding the validity of the Joint Resolution of March 14, 1912, announced that it felt obliged to follow what it considered was the rule of this Court, as announced in the *Chavez* and *Mesa* cases. Therefore, it gave no independent consideration to the question.

In the *Lucas* case the United States District Court for the Western District of Washington (Judge Netterer) similarly upheld the general Joint Resolution of January 31, 1922,

declaring that in doing so it was but following the *Chavez* case.

Of the *Chavez* case, it should be noted first, that no brief for the defendant-respondent was filed in this Court. Second, that no oral argument was made here in its behalf, the only brief and presentation being on the part of the Government. None of the questions now being argued was ever suggested to or considered by this Court, or in the Court below in the *Chavez* case. Fourth, the only question there considered was the meaning of the word "export" in the general resolution of March 14, 1912; and whether the indictment for failure to allege a "taking out" of this country had not failed to sufficiently allege "an export" within the meaning of that resolution.

In *Field* v. *Clark*, 143 U. S. 649, this Court exhaustively considered a provision in the Tariff Act of October 1, 1890, (c. 1244; 26 Stat. 567), for the retaliatory imposition of specified duties on certain products theretofore exempt, to go into effect upon the President's finding discrimination against the United States on the part of those countries, and making proclamation to that effect.

The Act imposed no import duty on sugars, molasses, coffee, tea and certain other products, but provided, by Section 3 thereof, for the suspension of such exemptions in certain cases, as follows:

> "SEC. 3. That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of

such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power *and it shall be his duty to suspend,* by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, * * *."

Respondents sought refund of duties (on imported merchandise) illegally exacted under such Act. No part of such merchandise consisted of articles included in Section 3, but it was claimed that the entire Act was void on the ground that Section 3 constituted an invalid delegation of power. It does not appear whether any proclamation had ever been made by the President under Section 3.

This Court upheld the delegation of power contained in Section 3. It pointed out that the President's judgment (as to whether duties imposed by other countries were reciprocally equal and reasonable) amounted to ascertainment of a fact; that it would be based upon existing commercial regulations of other countries; and that Section 3 imposed a *duty* upon the President, upon his finding such fact, to issue a proclamation declaring the suspension.

That the feature influencing this Court was the absence of discretion in the President, is shown by the following excerpt from the opinion (p. 693):

"Nothing involving the *expediency or the just operation* of such legislation was left to the determination of the President. * * * He had no *discretion in the premises* except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was *absolutely required* when the President ascertained the existence of a particular fact, it can not be said that *in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.*"

The Government's Statement (p. 13 of its Brief) that under Section 3 the President "*might* so proclaim" is thus entirely misleading.

No other case adjudicating a statute, the going into operation of which was made to depend upon the taking of Presidential action, arose until the *Panama* case, *supra*. There, although the President was authorized under certain circumstances to issue a well-defined order of prohibition, yet the circumstances under which the President should make his Proclamation *were so vaguely defined* that the President might arbitrarily either prohibit or permit the interstate transportation of oil. This court summed up its decision in that case as follows (p. 430):

"Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that §9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of cir-

cumstances and conditions in which the transportation is to be allowed or prohibited."

Similarly, in the present case, the wording of the Joint Resolution is such that the President was under no compulsion to issue his Proclamation unless he should choose to do so. It seems clear that under the principle of the *Field* and *Panama* cases, such lack of explicit directions and mandatory force is fatal to the validity of the Resolution.

III

THE RESOLUTION IS INVALID BECAUSE ITS DURATION, IF EVER IT WENT INTO OPERATION, WAS LEFT LIKEWISE TO THE UNCONTROLLED DISCRETION OF THE PRESIDENT.

Here the critical language was

"It shall be unlawful to sell * * * until otherwise ordered by the President or by Congress."

If the Congress should act it would in effect repeal the Resolution. This would be a purely legislative act. The President, in accomplishing the same thing—for it was to be done either by the Congress or the President—was also taking in essence legislative action.

So long as he did not act, i.e., so long as he made no order, the Resolution would continue in operation and sales would be unlawful. The President was not directed to do anything or determine anything as a basis for making this order. He was not required to give any reason for making it, if he did make it. No restraint, restriction or condition of any kind was put upon him, before he could so act. He could issue the order whenever he wanted to and thus, in his own uncontrolled discretion, bring the law to an end. The making an end of a law is as much a legislative act as is making the law

in the first instance. The reasoning under Point II of this brief is applicable here. With equal force it condemns as invalid a provision for ending the Resolution by mere Presidential proclamation.

IV

THE POWER TO PRESCRIBE LIMITATIONS AND EXCEPTIONS INVALIDATES THE RESOLUTION.

The Resolution declares

> "It shall be unlawful to sell, except under such limitations and exceptions as the President prescribes."

Here was a discretion to make sales lawful that otherwise would have been unlawful. There was no restriction or qualification upon the exercise of that discretion. The Congress announced no principle that should guide the President's action in that regard. If he searched the Resolution to find any direction or standard that he *might follow* in making up his mind whether or not to prescribe the limitation or exception, he would be left as uncertain in that regard after reading it as he was before.

Before reaching the exercise of this power, he must have found that a prohibition of the sale might contribute to restoring peace between Bolivia and Paraguay. It seems certain that in a situation where prohibition would contribute, the lessening of that prohibition would by so much, tend to make that contribution to peace less effective. What was done by the prohibition could be undone by limiting it or making exceptions thereto.

However that may be, the evil here was in bestowing an absolute power by limitation or exception, to neutralize at the President's uncontrolled discretion and at any time, the legislative declaration as to unlawful selling.

V

THE PROHIBITION OF THE SALE OF ARMS AND MUNITIONS NEVER WENT INTO EFFECT BECAUSE THE PRESIDENT FAILED TO COMPLY WITH THE CONDITIONS PRESCRIBED BY THE JOINT RESOLUTION.

While courts will not investigate the manner in which the President or any other high official, has carried out an *executive* or *administrative* function (*Philadelphia and Trenton Ry.* v. *Stimpson,* 14 Pet. 448), such rule has no application where a delegation of *legislative* power is involved. In the *Panama* case this Court said (p. 433):

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, *those determinations must be shown.*
>
> * * *
>
> We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation."

This rule is well-established (*Wichita Railroad & Light Co.* v. *Public Utilities Comm'n,* 260 U. S. 48, 59; *Mahler* v. *Eby,* 264 U. S. 32, 44). It requires, in a case where legislative power has been delegated, not only a substantial *compliance* with the conditions laid down by the legislative body, but also an *affirmative showing* that this has been done. Such affirmative showing is lacking in the present case.

This question is reviewable on this appeal, because it involves the validity of the Joint Resolution, in this: that without a sufficient proclamation there could not be the offense of unlawful selling.

By the Joint Resolution, the going into operation of the prohibition was expressly conditioned upon the issuance of a presidential proclamation to the following effect (in addition to the "finding" that such prohibition might contribute to the re-establishment of peace):

1. That the President has consulted with the governments of other American Republics and secured their cooperation;

2. That the President has secured the cooperation of such other governments as he deems necessary.

The presidential proclamation of May 28, 1934, contains the following statement:

> "I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the re-establishment of peace between those countries, and that I have consulted with the governments of other American Republics and *have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution;*"

From such proclamation it appears that the President consulted with the governments of other American Republics and that he secured assurances of the cooperation of such governments *as he deemed necessary.* There is no express declaration—no affirmative statement—that "such governments as I have deemed necessary" included *any* American

Republic. For all that the proclamation discloses, the President may have felt that the cooperation of the European governments producing arms and munitions, or certain of them, was alone essential, and may have deemed the cooperation of the other American Republics not to be necessary. This, however, clearly would not satisfy the requirements of the Joint Resolution.

The phrase "as contemplated by the said Joint Resolution" is not sufficient to indicate unequivocally that the President was asserting a full compliance.

But even if the proclamation be construed as asserting such compliance in general terms or as a conclusion of the President, this would not resolve the difficulty. The broader underlying question would still remain, whether such a general phrase amounts to an *affirmative showing* of compliance. This Court has held otherwise in *Mahler* v. *Eby*, 264 U. S. 32.

That case concerned the delegation to the Secretary of Labor of the power to deport those members of certain specified classes whom he found to be undesirable citizens. The Court held that this was a proper delegation of power but in the case before it the Secretary had failed to make an *express* finding that the individuals concerned were undesirable residents within the meaning of the Act. Holding this omission to be fatal, this Court made the following statement (p. 43):

> "In the case before us the defect in the warrants of deportation has not been supplied. The defect is jurisdictional. There is no authority given to the Secretary to deport except upon his finding, after a hearing, that the petitioners were undesirable residents. There is no evidence that he made such a finding except what is

found in the warrant of deportation. The warrants recite that, upon the evidence, the Secretary has become satisfied that the petitioner aliens have been found in the United States in violation of the Act of May 10, 1920, and that they were finally convicted of the offenses named in the act. They could not have been found in the United States in violation of the Act of 1920 until after the Secretary had found that they were undesirable. * * *"

The President is under no different rule, *Panama Refining Co.* v. *Ryan*, *supra* (p. 433).

In *Mahler* v. *Eby* (supra) there was no imputation of bad faith upon the part of the Secretary. The Court did not question his judgment, and accordingly in reversing the judgment of the District Court it directed that the petitioner should not be discharged "until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against him" (p.44).

The same jurisdictional defect is present here. We assert, in the language of the *Panama* case, that it would be a violation of due process to punish the appellees "for the crime of violating a legislative order", where those "determinations of fact", on which the President's authority to make such order depended, have not been shown.

VI.

THE JOINT RESOLUTION IS NOT PRESENTLY VALID, OR ALIVE FOR THE PURPOSE OF SUSTAINING PROSECUTION FOR OFFENSES HERETOFORE COMMITTED THEREUNDER.

The Joint Resolution of May 28, 1934, provided that, upon a prescribed presidential proclamation, it should thereupon

become unlawful to sell any arms or munitions of war in the United States, to Bolivia or Paraguay,

> "*until otherwise ordered by the President* or by Congress."

By his proclamation of November 14, 1935, the President revoked the former proclamation

> "as to the sale of arms and munitions of war to Bolivia or Paraguay from and after November 29, 1935."

This proclamation further provided that such revocation should not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the earlier proclamation, or the Joint Resolution; and that each should be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any such penalty, forfeiture or liability.

That revoking proclamation made such sales lawful after November 29, 1935. Thereafter, it was no longer a criminal offense to sell (Government's brief, p. 25).

It follows that the Joint Resolution expired on November 29, 1935. That Resolution was intended by Congress as a temporary provision, to be in force during the period between the first proclamation putting the prohibition into effect, and the later proclamation removing it. The Resolution was to be effective "until otherwise ordered by the President or by Congress." That time limit was reached when the revoking proclamation was issued. Having then expired, no further judicial proceedings could be had thereunder, unless competent authority had kept it alive for that purpose.

In *Yeaton* v. *U. S.*, 5 Cranch., 281, this Court accorded early recognition to this principle. Therein it said (pp. 283-4):

> " * * * it has been long settled, on general principles, that after the expiration or repeal of a law, no

> penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

In *United States* v. *Chambers*, 291 U. S. 207, this Court said (pp. 223 and 226):

> "In case a statute is repealed or *rendered inoperative*, no further proceedings can be had to enforce it in pending prosecutions unless competent authority has kept the statute alive for that purpose.
>
> * * * * *
>
> Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it."

See also *The Schooner Rachel*, 6 Cranch. 329.

That this is an established principle is freely admitted by the Government (p. 25 of its brief).

The Government insists that the right to prosecute was preserved in our case (1) by the saving proviso of the second Presidential Proclamation and (2) by R. S. Sec. 13. We submit that neither contention is well founded.

THE JOINT RESOLUTION DID NOT CONFER ANY POWER ON THE PRESIDENT TO KEEP IT ALIVE FOR THE SAKE OF PROSECUTIONS (AFTER HIS REVOCATION THEREOF).

The Congress itself made no express provision in the Joint Resolution that offenses committed before the date of the revoking proclamation should be thereafter punished. Nor did it indicate therein any such intention. Nor did it confer upon the President any authority so to keep the Joint Resolution in force. In undertaking to do so, he exercised a power belonging solely to Congress.

The authority to continue a statute in order to permit the

enforcement of liabilities previously incurred thereunder, is like that involved in its original enactment. Since Congress made no effort to confer such power upon the President, that part of his revoking proclamation purporting to keep the Joint Resolution in effect for the purpose of prosecutions is clearly without effect. Nor does the fact that he followed almost literally the language of R. S. Sec. 13, give it any added force.

REVISED STATUTES, SECTION 13, WILL NOT APPLY TO SAVE THIS PROSECUTION.

R. S., Section 13, reads:

> "The *repeal* of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the repealing Act shall so expressly provide,* and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

By its terms, this section is applicable only where a statute has been *"repealed"*. The word "repeal" means the abrogation of one statute *by another statute. Jessee* v. *DeShong* (Texas), 105 S. W. 1011, 1014; *Oakland Pav. Co.* v. *Hilton*, 69 Cal. 479; *The Butte Consold. Mining Co.* v. *Montana Ore Purchasing Co.*, 24 Mont. 125; *City of St. Louis* v. *Kellman*, 235 Mo. 687. The phrase "unless the repealing Act shall so expressly provide", requires such a repealing Act to bring the case within the operation of the Section.

That section was enacted February 25, 1871, one week after the decision of this court in *United States* v. *Tynen*, 11 Wall. 88. It seems plain that it was enacted for the purpose of preventing a recurrence of such a situation as had arisen in that case, wherein one Act had been impliedly re-

pealed by a subsequent Act, but the later Act made no provision for the preservation of a right to enforce penalties incurred under the former, because whereof this Court had held in the *Tynen* case, that all criminal proceedings based upon the former Act must fail.

As stated in the District Court for the District of Minnesota in *United States* v. *Chicago, St. P., M. & O. Ry. Co.*, 151 Fed. 84, 93:

> "By Section 13, Congress, in words so plain that they do not need any construction, says to the courts, as it has a right to say: 'When *we repeal* a penal statute, you shall not release those who have violated the Act repealed from punishment for violations thereof, unless the repealing Act so expressly provides.'"

Mere termination of an Act is not repeal. *Moore* v. *United States*, 85 Fed. 465.

As Congress has taken no action with respect to the Joint Resolution since originally enacting it, it is clear that the Joint Resolution has never been repealed.

For another reason, the absence of a repealing act forbids the contention that R. S. Section 13 applies in the present case. That section declares a general rule for the construction of repealing statutes. It is not a rule of law in itself, but is merely to be read *into* a *repealing* statute as an effective provision thereof, unless Congress explicitly provides otherwise in the repealing statute itself. As originally enacted, it was the fourth and concluding section of the Act of February 25, 1871, Chapter 71, which was entitled:

> "An Act prescribing the form of enacting and resolving clauses of acts and resolutions of Congress, *and rules for the construction thereof.*"

This Court has defined R. S. Section 13 as follows in *Hertz* v. *Woodman,* 218 U. S. 205, 217:

> "This provision has been upheld by this court as a rule of construction applicable, when not otherwise provided, *as a general saving clause to be read and construed as a part of all subsequent repealing statutes,* in order to give effect to the will and intent of Congress. *U. S.* v. *Reisinger,* 128 U. S. 398; *Great Northern Ry. Co.* v. *U. S.,* 208 U. S. 452."

Still another reason forbids its application to our case. Applicable as it was, only to a state of war between Paraguay and Bolivia, it cannot be gainsaid that the Joint Resolution of May 28, 1934, was in every sense but a *temporary* enactment. If punishments are to be saved after the expiration of a *temporary* statute, particular provision must be made by law therefor. A general provision will not suffice to secure this result, unless it is specifically made applicable to *temporary* statutes. *The Irresistible,* 7 Wheaton 551.

In that case a statute of 1818 repealed certain other acts (including a temporary embargo act of 1817, which by its terms was to expire in 1819), but expressly provided that prosecutions for violations of offenses previously committed under all the statutes thereby repealed should be preserved. It was held that this saving provision conferred no power to prosecute under the *temporary* Act after March 3, 1819, the date on which such act should, if not repealed, have expired, for offenses committed prior to the repealing act of 1818.

In that case (p. 552), this Court observed that such a saving clause

> "does not create a power to punish, but preserved that which before existed. Now it is well settled that an offense against a temporary act cannot be punished,

after the expiration of the act, unless a particular provision be made by law for the purpose."

Clearly, R. S., Section 13, is not a *"particular provision"* of law for the purpose of continuing the *temporary* Joint Resolution of May 28, 1934, in effect for the purpose of this prosecution after November 29, 1934, when, by its terms, the Joint Resolution expired.

CONCLUSION

It is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

/s/ Robert D. Shea

WILLIAM WALLACE,

Counsel for Appellees, Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc.